

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

HANS-CLEMENS STEFFEL
Junior Party
(Patent No. 6,703,925),

v.

KENNETH SCHOFIELD and MARK L. LARSON
Senior Party
(Application No. 11/074,521).

Patent Interference No. 105,736 (SCM)
(Technology Center 2600)

*Before JAMESON LEE, SALLY GARDNER LANE and
SALLY C. MEDLEY, Administrative Patent Judges.*

MEDLEY, Administrative Patent Judge.

1 JUDGMENT – Bd. R. 127

2 The motions filed during the preliminary motions phase of the
3 interference have been decided. (Paper 95). Steffel did not file a priority
4 statement. Bd.R. 204(a)(3). Therefore there will not be a priority phase of
5 the interference.

6 It is

1 ORDERED that judgment as to the subject matter of Count 1 (Paper
2 1 at 4) is entered against Steffel;

3 FURTHER ORDERED that claims 1-16 of Steffel's involved Patent
4 6,703,925, which correspond to Count 1, are CANCELLED,
5 35 U.S.C. § 135(a);

6 FURTHER ORDERED that the parties shall note the requirements
7 of 35 U.S.C. § 135(c) and Bd. R. 205; and

8 FURTHER ORDERED that a copy of this judgment be entered in
9 the administrative records of the involved Steffel Patent 6,703,925 and
10 Schofield Application 11/074,521.

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*Before JAMESON LEE, SALLY GARDNER LANE, and SALLY C. MEDLEY,
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MEDLEY, Administrative Patent Judge.

DECISION –MOTIONS – Bd.R. 125

1 A. Introduction

2 The purpose of an interference is to determine priority of invention. Steffel
3 did not file a priority statement and therefore does not contest priority. Rather,
4 Steffel filed two motions, either of which if granted, would deprive Schofield
5 standing to be in the interference. Steffel's two motions are the subject of this

1 decision.

2 Steffel seeks judgment against Schofield on the basis that all of Schofield's
3 involved claims 93-131 are unpatentable under the written description and
4 enablement requirements of 35 U.S.C. § 112, ¶ 1. (Steffel Motion 1; Paper 44).

5 We DENY-IN-PART and DISMISS-IN-PART Steffel Motion 1.

6 Steffel seeks judgment against Schofield on the basis that all of Schofield's
7 involved claims 93-131 are unpatentable under of 35 U.S.C. § 135(b)(2). (Steffel
8 Motion 2; Paper 45).

9 We DENY Steffel Motion 2.

10 B. The Interfering Subject Matter

11 The interfering subject matter generally relates to a monitoring device for
12 vehicles that includes a camera arranged behind a rear view mirror. Count 1, the
13 sole count, is Steffel claim 1 or Schofield claim 93. (Paper 1 at 4). Schofield
14 claim 93 is as follows:

15 A monitoring device for vehicles, said monitoring device
16 comprising:

17 a housing;

18 at least one electrochromic mirror glass arranged in said
19 housing so as to have a front side facing an observer;

20 said at least one electrochromic mirror glass comprising a
21 reflective layer being reflective in the visible spectral range of light;
22 and

23 at least one camera arranged behind said reflective layer in a
24 viewing direction viewed from said front side, wherein said at least

1 one camera takes images through the reflective layer wherein said
2 electrochromic mirror glass has an electrochromic layer and wherein
3 said reflective layer is arranged behind said electrochromic layer in
4 said viewing direction.

5 C. Findings of fact

6 1. Steffel is involved on the basis of patent 6,703,925, granted 9 March
7 2004, based on application 09/771,140, filed 26 January 2001.

8 2. Schofield is involved on the basis of application 11/074,521, filed 8
9 March 2005.

10 3. Schofield has been accorded benefit for the purpose of priority of several
11 earlier applications (Paper 1 at 4-5), resulting in Schofield having an earliest
12 constructive reduction to practice date of 7 June 1995.

13 4. Steffel did not file a priority statement.

14 5. Steffel real party in interest is SMR Patents S.a.r.l. (Paper 9).

15 6. Schofield real party in interest is Magna Mirrors of America, Inc. (Paper
16 4).

17 7. Count 1 is as follows :

18 Claim 1 of Steffel's patent 6,703,925

19 or

20 Claim 93 of Schofield's application 11/074,521

21 8. The claims of the parties are :

22 Steffel : 1-16

23 Schofield : 93-135

24 9. The claims of the parties which correspond to Count 1 are :

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1 Steffel : 1-16

2 Schofield : 93-131

3 10. The claims of the parties which do not correspond to Count 1, and
4 therefore are not involved in the interference are:

5 Steffel : none

6 Schofield : 132-135

7 D. Steffel Motion 1

8 Steffel moves for judgment against Schofield on the basis that Schofield's
9 involved claims 93-131 are unpatentable under 35 U.S.C. § 112, first paragraph,
10 based on the written description requirement and the enablement requirement.
11 (Paper 44). To be sufficient, a motion must provide a showing, supported with
12 appropriate evidence, such that, if unrebutted, it would justify the relief sought.
13 The burden of proof is on the movant. Bd.R. 208(b).

14 The count is Schofield independent claim 93 or Steffel independent claim 1.
15 (Paper 1 at 4). Schofield independent claims 109, 117 and 125 correspond to the
16 count. For purpose of Steffel Motion 1, Schofield's various dependent claims
17 stand or fall with their respective independent claim. (Paper 19 at 2:11-13; Paper
18 44 at 2:2-7). Schofield needs one claim to be in interference with Steffel, e.g., one
19 of Schofield independent claims 93, 109, 117 or 125 to survive the written
20 description and enablement attacks. Therefore, if Steffel fails to satisfy its burden
21 with respect to one of Schofield's independent claims, the motion will be denied
22 with respect to that one claim and dismissed without consideration of Steffel's
23 arguments as to all of Schofield's other claims.

24 For reasons that follow, Steffel has failed to sufficiently demonstrate that

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Schofield claim 109 is unpatentable under 35 U.S.C. 112, ¶ 1 based on either the written description or enablement requirements. The focus of our analysis is on Schofield claim 109.

Schofield claim 109 is reproduced below with the pertinent language in italics.

A monitoring device for a vehicle, said monitoring device comprising:

an interior review mirror assembly mountable to a portion of a vehicle, said review mirror assembly comprising a housing and a variable reflectance mirror element;

the reflectance level of said mirror element being variable in response to a change in a drive signal applied to said mirror element;

said mirror element comprising a reflective layer that is reflective to visible light incident thereon; and

at least one imaging sensor arranged behind said mirror element and having a field of view through said mirror element in a generally rearward direction with respect to the vehicle, wherein *said at least one imaging sensor captures images through said reflective layer of said mirror element.*

Steffel does not present arguments for the separate Schofield independent claims. Rather, Steffel argues all of Schofield's independent claims together. This approach is problematic because the independent claims are different. Claim 109, for example, does not recite an electrochromic layer, despite Steffel's argument

1 that all of Schofield's claims corresponding to Count 1 require a camera behind an
2 electrochromic layer. (See, e.g., Paper 44 at 8:5-8). Indeed, one premise behind
3 Steffel's written description argument is that the claims require (1) a camera or
4 photosensor array, a reflective coating or layer, and an electrochromic layer, and
5 (2) that the camera or photosensor array takes images through both the reflective
6 layer and the electrochromic layer. (See, e.g., Paper 44 at 10:20 to 11:1).

7 While Schofield claim 93 does require a reflective layer and an
8 electrochromic layer, claim 109 does not.¹ Moreover, claim 109 does not recite
9 that the sensor array take images through two layers of materials as Steffel argues.
10 Claim 109 requires that the mirror element comprise a reflective layer and that the
11 at least one imaging sensor is arranged behind the mirror element (comprising the
12 reflective layer). Claim 109 further recites that the at least one imaging sensor
13 captures images through the reflective layer of the mirror element. There is no
14 other layer or coating claimed in claim 109. Thus, Steffel's argument that there is
15 no support in the Schofield specification for "the claims of Count 1 because never
16 in Schofield is the camera or photosensor array truly taking images through both
17 the reflective coating and the electrochromic layer" (Paper 44 at 10:20-22) is not
18 persuasive. The argument is not commensurate in scope with the limitations of
19 Schofield claim 109.

20 The holding in *Agilent*² does not change our analysis despite Steffel's

¹ Steffel did not request to file a motion to undesignate Schofield claim 109 from Count 1. Steffel did not request to file a motion to redefine the interfering subject matter by proposing a new count formed by Schofield claim 109, for example. (Papers 18 and 20).

² *Agilent Technologies, Inc. v. Affymetrix, Inc.*, 567 F.3d 1366, 1374 (Fed. Cir. 2009).

1 argument that non-copied claim 109 should be interpreted just as copied claim 93
2 is interpreted. (Paper 44 at 5:5-10). Claim 109 is different from claim 93 and does
3 not require an electrochromic layer or a similarly claimed second layer. Steffel has
4 not directed us to where in *Agilent* that our reviewing court has instructed us to
5 ignore the plain meaning of a non-copied claim, but instead interpret the non-
6 copied claim by importing unclaimed terms from a copied claim. The argument
7 simply makes no sense and Steffel has not presented the argument in a cogent
8 manner.³

9 Steffel also argues, with respect to all of the Schofield independent claims,
10 that Schofield's specification does not provide written description support for a
11 photosensor array that takes images through the reflective layer. (Paper 44 at 6:2-
12 3). Schofield claim 109 similarly recites an imaging sensor that captures images
13 through the reflective layer and so the argument is at least commensurate in scope
14 with claim 109.

15 Steffel argues that claim 109 requires a continuous reflective layer made of
16 one and the same material. (See, e.g., Paper 44 at 8-10). Claim 109 is not so
17 restrictive. Claim 109 does not recite that the reflective layer be continuous or
18 made of one type of material. We understand Steffel to arrive at its proposed claim
19 interpretation for Schofield's claims by looking to Steffel's specification,
20 particularly at Steffel's disclosed embodiments. In particular, Steffel directs
21 attention to its Figure 1, which shows a continuous reflective layer across the entire

³ Although we deny Steffel's motion 1 without considering Schofield's opposition or Steffel's reply, we note, that in its reply, Steffel appears to agree that Schofield claim 109 does not require an electrochromic layer (Paper 57 at 4:1-2; "And while claims 109 and 117 do not claim an electrochromic layer, they both require the

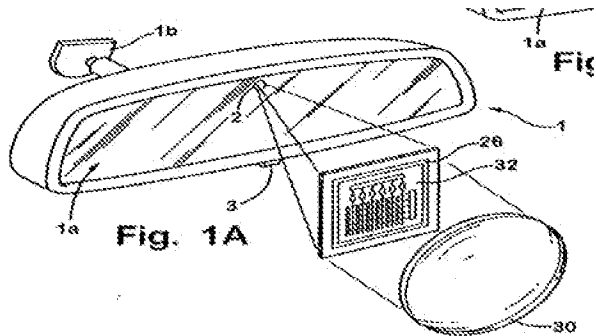
1 backside of the electrochromic mirror glass. We disagree with Steffel that we
2 should interpret Schofield claim 109 in light of Steffel's specification. Claim 109
3 is not a copied claim and includes claim elements that are not claimed by Steffel
4 and that are not disclosed in Steffel's specification. (*See, e.g.*, Paper 57 at 26; FFs
5 51 and 52 admitted). It simply would not make sense to interpret some terms in
6 light of Steffel's specification, but interpret other terms in light of Schofield's
7 specification.

8 In any event, even if we interpret "reflective layer" in light of Steffel's
9 specification, we disagree with Steffel that the term "reflective layer" means one
10 continuous layer made of the same material. Steffel has not directed us to where in
11 its specification it specifically defines reflective layer. As such, that term has the
12 meaning that a person of ordinary skill in the art would understand it to mean.
13 Steffel does not direct us to supporting evidence that would explain that one of
14 ordinary skill in the art would understand a reflective layer to mean a continuous
15 layer made of the same material. Notwithstanding the fact that certain Steffel
16 embodiments describe a continuous reflective layer made of the same material, we
17 disagree that we are required to interpret Schofield claim 109 so as to import those
18 features into claim 109. Claims are to be interpreted in light of the specification
19 without importing limitations into the claims. This is so, even if Steffel is correct
20 that the term "reflective layer" must be interpreted in light of Steffel's
21 specification. Accordingly, Schofield claim 109 does not require a continuous
22 reflective layer made of the same material.

23 Steffel's remaining arguments are based on the incorrect claim interpretation

camera to image through the reflective layer." Emphasis in original).

that Steffel proposes. Specifically, Steffel argues that Schofield's disclosed embodiments with a hole in the reflective layer that is filled with a different reflective layer does not provide written description support for the "reflective layer." Schofield Fig. 1a is reproduced below:



Schofield shows in Fig. 1a, a photosensor 2, e.g., imaging sensor, facing rearwardly of the mirror 1. (Ex. 2001 at 19:1-5). The mirror element 1a includes a reflective layer. A hole is provided in the reflective layer to allow the imaging sensor to image through the reflective layer. (Ex. 2001 at 20:16-25). However, "a reflective surface is maintained within the hole to both preserve the cosmetic appearance of the assembly as viewed by the driver and to maximize the reflective surface." (Ex. 2001 at 20:35 to 21:1). Steffel has not sufficiently explained why the hole that is also filled with a reflective surface (e.g., layer), does not, along with the original reflective surface constitute a reflective layer. Steffel relies on the declaration of Richard Raber (Raber) in support of its motion. We have considered Raber's declaration, but do not give it substantial weight because Raber does not provide a sufficient factual basis for the statements he makes. For example, Raber declares:

22. Nowhere does Schofield state the sensor is behind the reflective

1 layer of the mirror. Schofield does mention that it can cover the hole
2 with a different type of reflective layer (p. 20, line 35 – p. 21, line 22),
3 but it cannot cover the hole with the same reflective layer that it uses
4 for the working reflective surface. (Ex. 2005).
5

6 Although Raber continues to explain why the described reflective layer
7 materials in Schofield's specification are not the same, he does not sufficiently
8 explain why it matters. His testimony appears to be based on the erroneous
9 assumption that the Schofield claims require the reflective layer to be made of only
10 one continuous material. As already explained, however, Schofield claim 109 is
11 broad and encompasses a "reflective layer" that can be discontinuous and made of
12 more than one material. Accordingly, we are not persuaded by Steffel's arguments
13 that the description in Schofield's specification of the embodiment of the filled
14 hole of reflective material does not provide written description support for the
15 reflective layer of Schofield claim 109.

16 Lastly, we note that even if Schofield claim 109 requires a reflective layer
17 that is made of one continuous material, Steffel has not sufficiently explained why
18 Schofield's alternative embodiment does not provide descriptive support for such
19 an interpretation. The alternative embodiment provides:

20 In particular, an interference filter known as a long-wave pass filter or
21 *cold mirror reflects visible light, transmits infrared illumination* and
22 looks like the normal silvered mirrors typically used in the rearview
23 mirror 1. Unlike cold mirrors, however, silvered mirrors reflect near
24 infrared illumination. *Since the cold mirror resembles the silvered*
25 *mirror in the rearview mirror 1, it may be used to replace a section or*
26 *even all of the silvered mirror.* (Ex. 2001 at 38:16-24; emphasis
27 added).
28

29 While Raber seems to recognize this passage (Ex. 2005 at ¶ 18), he does not

1 sufficiently explain why the described cold mirror embodiment does not provide
2 written description support for the claim 109 requirement of a reflective layer, even
3 assuming the claim requires a continuous layer of the same material. Moreover,
4 we are not persuaded by Steffel's argument that the alternative embodiment
5 described above still requires the use of a hole in the reflective layer. We do not
6 agree, since Steffel has not sufficiently demonstrated, with supporting evidence
7 that one of ordinary skill in the art would understand this to be the case. Nowhere
8 in the above passage, describing a separate embodiment, is there mention of a hole.
9 The above passage explains that the cold mirror may be used to replace all of the
10 silvered mirror. We have considered Steffel's arguments at page 10, lines 12-19,
11 that because the same embodiment describes the use of a supplemental source of
12 illumination that that means a hole is required, but do not find such arguments
13 persuasive. Steffel does not sufficiently explain the argument, nor direct us to
14 evidence to support the assertions it makes. Argument of counsel cannot take the
15 place of evidence. *See, Estee Lauder Inc. v. L'Oreal, S.A.*, 129 F.3d 588, 595 (Fed.
16 Cir. 1997) (Argument of counsel cannot take the place of evidence lacking in the
17 record). For these reasons, Steffel has not sufficiently demonstrated why a person
18 of ordinary skill in the art would understand that a hole, with respect to the cold
19 mirror embodiment, would be necessary.

20 For all of the above reasons, Steffel has failed to sufficiently demonstrate
21 that Schofield independent claim 109, which corresponds to the count, is
22 unpatentable under the written description requirement of 35 U.S.C. § 112, first
23 paragraph.

1 Enablement

2 Steffel's arguments regarding enablement are similar to its arguments with
3 respect to written description support. First, as already explained, claim 109 does
4 not require a camera or photosensor that takes images through a reflective layer
5 and an electrochromic layer. Claim 109 does not recite an electrochromic layer as
6 already explained.

7 Steffel's remaining arguments are based on the notion that claim 109
8 requires a continuous reflective layer that is made of the same material. Steffel
9 argues to change the reflective coating to avoid the hole in the reflective layer,
10 described in Schofield's specification, would require undue experimentation.
11 (Paper 44 at 12:13-19).

12 We have already explained why Schofield claim 109 does not require a
13 continuous reflective layer that is made of the same material. Thus, all of Steffel's
14 arguments in that regard necessarily fail. In any event, Steffel does not explain
15 why the embodiment that describes a cold mirror (Ex. 2001 at 38:16-24) does not
16 enable the claimed invention even if Schofield claim 109 does require a continuous
17 reflective layer made of the same material. We have reviewed Raber's testimony.
18 He does not explain why one of ordinary skill in the art would not readily
19 understand the type of material that would be used for the "cold mirror"
20 embodiment described in Schofield's specification.

21 Various factors are to be considered to support a conclusion that a disclosure
22 would require undue experimentation. *In re Wands*, 858 F.2d 731, 737 (Fed. Cir.
23 1988). One of the *Wands* factors is the state of the prior art at the time of the
24 invention. It is axiomatic that a specification need not teach, and preferably omits,

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1 what is well known in the art. *Spectra-Physics, Inc. v. Coherent, Inc.*, 827 F.2d
2 1524, 1534 (Fed. Cir. 1987). Moreover, describing the function of an apparatus
3 may be sufficient where the structure is conventional and can be determined
4 without undue experimentation. *In re Gunn*, 537 F.2d 1123, 1127 (CCPA 1976).

5 In connection with his contentions that Schofield's specification does not
6 provide enough information to enable the claimed reflective layer, Raber does not
7 meaningfully discuss or explain the state of the prior art at the time of the
8 invention. It is not our place, in the first instance, to review the prior art references
9 that are of record, determine what they describe, and determine whether the
10 references do or do not demonstrate what was well known in the art as far as
11 reflective layers are concerned. *Ernst Haas Studio, Inc. v. Palm Press, Inc.* 164
12 F.3d 110, 112 (2d Cir. 1999) (declining invitation to scour record to make out a
13 party's case for it). "Judges are not like pigs, hunting for truffles buried in briefs."
14 *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

15 Raber does not meaningfully discuss what the prior art references generally
16 taught or was known about reflective layers such as cold mirrors. Nor does he
17 explain the general knowledge the person of ordinary skill in the art would have
18 had regarding reflective layers such as cold mirrors. We do not give Raber's
19 testimony substantial weight that what is described in the Schofield specification is
20 not enough, since Raber fails to provide a sufficient factual basis for that
21 conclusion. Our rules state that expert testimony that does not disclose the
22 underlying facts or data on which an opinion is based is entitled to little or no
23 weight. 37 C.F.R. § 41.158(a). *See also Rohm and Haas Co. v. Brotech Corp.*, 127
24 F.3d 1089, 1092, (Fed. Cir. 1997) (nothing in the Federal Rules of Evidence

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1 requires the finder of fact to credit the unsupported assertions of an expert
2 witness). For the reasons stated above, Raber's testimony is not entitled to
3 substantial weight and therefore, Steffel has failed to prove, by a preponderance of
4 the evidence that it is entitled to the requested relief.

5 For all of the above reasons, Steffel has failed to sufficiently demonstrate
6 that Schofield independent claim 109, which corresponds to the count, is
7 unpatentable under the enablement requirement of 35 U.S.C. § 112, first paragraph.

8 Steffel Motion 1 is DENIED-IN-PART and DISMISSED-IN-PART.

9 E. Steffel Motion 2

10 Steffel moves for judgment on the basis that all of Schofield's claims
11 involved in the interference are barred by 35 U.S.C. § 135(b)(2). (Paper 45 at 1:2-
12 3). According to § 135(b)(2):

13 A claim which is the same as, or for the same or substantially the
14 same subject matter as, a claim of an application published under
15 section 122(b) of this title may be made in an application filed after
16 the application is published only if the claim is made before 1 year
17 after the date on which the application is published.

18 The Board has construed §135(b)(2) to bar a claim only if the claim of a
19 published application ultimately issues as published or issues with no material
20 changes. *Ryan v. Young*, 2008 WL 577435, Interference 105,504 and 105,505,
21 Paper 116 at 43 (BPAI 2008). An example of what constitutes a material change is
22 when a claim has been amended to include a limitation such as to avoid prior art
23 cited by the Examiner. *Parks v. Fine*, 773 F.2d 1577, 1579 (Fed. Cir. 1985); *In re*
24 *Berger*, 279 F.3d 975, 982-83 (Fed. Cir. 2002). We adopt the rationale provided in
25 *Ryan*.

1 Steffel is apparently aware of the holding in *Ryan* (see, e.g., Paper 45 at 3:7-
2 10) and does not argue against the application of that decision. Rather, Steffel
3 argues that:

4 Even though claim 1 of Steffel's published '140 application was
5 amended during prosecution, the amendments essentially only
6 incorporated into claim 1 the limitations from claim 4 as published in
7 Steffel's '140 application. In more detail, claim 4 of Steffel's
8 published '140 application was dependent upon both claims 3 and 1,
9 and claim of Steffel's '925 patent includes the elements from claims
10 1, 3 and 4 of Steffel's '140 application. Because Schofield copied the
11 claims from Steffel's '925 patent, Schofield's involved claims
12 likewise are essentially the same as the claims in Steffel's published
13 '140 application. (Paper 45 at 9:11-17).

14
15 The above-quoted text suggests that Steffel's '140 published application
16 claim 4 issued as published (as Steffel patent claim 1) or issued with no material
17 changes. That is not the case. Steffel's involved claim 1, which is the only Steffel
18 independent claim, has a limitation not found in any of the Steffel published
19 application claims. Steffel's involved claim 1 includes "wherein said at least one
20 camera takes images through the reflective layer." That limitation was clearly
21 added during prosecution of the Steffel application to overcome the Examiner's
22 rejection of Steffel's claim based on prior art of record. (Ex. 1023 and 1024).
23 Steffel's silence with respect to this limitation leads us to conclude that Steffel has
24 not sufficiently demonstrated that the addition of the limitation was not a material
25 one. Accordingly, Steffel has failed to sufficiently demonstrate that 135(b)(2) bars
26 Schofield's claims which also include this limitation. Because 135(b)(2) does not
27 bar Schofield's claims as explained, we need not and do not consider Steffel's
28 remaining arguments.

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1 G. Order

2 It is

3 ORDERED that Steffel Motion 1 is DENIED-IN-PART and
4 DISMISSED-IN-PART; and

5 FURTHER ORDERED that Steffel Motion 2 is DENIED.

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